Supreme Court, U.S.
FILED

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No. _____

In the
SUPREME COURT OF THE UNITED STATES

LAVERNE SCHERPING; LOREN SCHERPING;
JANE SCHERPING; EPSILON COMPANY;
C.J.S. RANCH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I: Whether the District Court erred in ordering a "reverse pierce" and imposing liability on CJS Ranch for tax obligations of the Scherpings?

A. Whether any action to impose liability on CJS Ranch stands barred by the applicable federal statute of limitations?

B. Whether Minnesota law recognizes the remedy of a creditor's "reverse pierce," except in extremely limited circumstances?

C. Whether this case meets the stringent criteria for allowing a "reverse pierce" under Minnesota law?

II: Whether the Scherpings were rendered insolvent by the transfer of their real property to the Epsilon business trust and so could not have conveyed this real property fraudulently as this term is defined in Minnesota Statutes, Section 513.26 (1979)?

CORPORATE DISCLOSURE STATEMENT

One appellant here, CJS Ranch, is a valid Minnesota business trust and remains a party to this litigation. Scherpings are beneficiaries of this Trust. CJS Ranch has no parent corporation, nor does any publicly held company own 10% or more of CJS Ranch's stock.

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PETITION FOR A WRIT OF CERTIORARI

Appellants Laverne Scherping, Loren Scherping, Jane Scherping, "Epsilon Company," and "C.J.S. Ranch" ask that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit, *United States of America, Appellee v. Laverne Scherping; Loren Scherping; Jane Scherping; Epsilon Company; C.J.S. Ranch, Appellants*, 187 F.3d 796 (8th Cir. 1999), submitted Feb. 9, 1999, and filed of record Aug. 11, 1999.

OPINIONS BELOW

This Petition seeks review of the reported decision of the United States Court of Appeals for the Eighth Circuit, *United States of America, Appellee v. Laverne Scherping; Loren Scherping; Jane Scherping; Epsilon Company; C.J.S. Ranch, Appellants*, 187 F.3d 796 (8th Cir. 1999), submitted Feb. 9, 1999, and filed of record Aug. 11, 1999, reprinted on page 1a of the Appendix. Judgment was entered Aug. 11, 1999. This appellate decision largely affirmed the unpublished decision of Judge Paul Magnuson of the United States District Court for the District of Minnesota, *United States of America v. Laverne Scherping; Loren Scherping; Jane Scherping; "Epsilon Company"; and C.J.S. Ranch Trust*, Civil File No. 97-2282 (PAIWJGL), filed March 4, 1998, reprinted at page 19a of the appendix, and the unpublished decision of Judge Harry MacLaughlin of the United States District Court for the District of Minnesota which dismissed the original service of process on C.J.S. Ranch, filed May 31, 1990, reprinted at appendix 35a.

The current case before this United States Supreme Court is a collection action based on two previous tax court cases, *Scherping v. Commissioner*, 747 F.2d 478, 480 (8th

Cir.1984) (per curiam) (Laverne Scherping), and *Scherping v. Commissioner*, 725 F.2d 689 (8th Cir.1983) (table) (Loren Scherping).

STATEMENT OF JURISDICTION

This petition seeks to review the decision of the United States Court of Appeals for the Eighth Circuit, filed August 11, 1999. Therefore, this United States Supreme Court's jurisdiction is properly based on 28 U.S.C. § 1254. This petition is filed within 90 days of the Court of Appeals' entry of its final decision, August 11, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 [1] of the Constitution of the United States of America states that "[t]he Congress shall have Power To Lay and Collect Taxes." The 16th Amendment to the United States Constitution states that "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Title 26 U.S.C. § 6502, as in effect at the relevant time, provided in pertinent part:

> (a) Length of period. -- Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun--

(1) within 6 years after the assessment of the tax, or ....

If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

Minn. Stat. § 318.02, subd. 4 states that:
"No personal liability for any debt or obligation of any such association heretofore or hereafter organized shall attach to the owners of the shares of beneficial interests, beneficiaries, shareholders, or trustees of any such associated heretofore or hereafter organized, or to any person or party to the "declaration of trust".

The following sections were in effect in 1979 and 1982 at the time of the alleged transfers to Epsilon in 1979 and C.J.S. Ranch in 1982.

Minn. Stat. § 513.25 provided:
"Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he [or she] will incur debts beyond his [or her] ability to pay as they mature, is fraudulent as to both present and future creditors."

Minn. Stat. § 513.26 provided:
"Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

STATEMENT OF THE CASE

In the early 1970's, Lavern and Loren Scherping were gifted 181.73 acres of farm property by their parents as part of a staggered conveyance to avoid gift tax consequences. In 1979, Lavern and Loren deeded their 181.73 acres to Epsilon Company Trust for a nominal consideration. At the same time, their mother, Laura Scherping, deeded 220 acres, including the homesite and principal buildings. Lavern, Loren and Laura served as the three trustees of Epsilon Company. The consideration received by each of the Scherpings for the transfer of the property was 33 1/3% of the outstanding shares of Epsilon Company Trust. After the transfer, Laura and Lavern continued to live on the main homestead; Loren and his family lived in a separate home located on the 181.73 acres. Lavern and Loren continued their farming operation.

In June 1982, Loren, Lavern and Laura Scherping filed the Epsilon trust agreement with the Minnesota Secretary of State under Minn. Stat. § 318.01, for the purpose of authenticating the trust under Minnesota law. They accompanied this filing with a new deed to Epsilon Company in which they recited a nominal consideration.

The final transfer of the farm property occurred on August 18, 1992, when Epsilon Company, by its trustees,

Lavern, Loren and Laura, executed a deed transferring the Epsilon property to CJS. In addition to the 180 acres conveyed by Loren and Lavern Scherping to Epsilon, this deed included the 220 acres originating from Laura Scherping.

The United States Court of Appeals for the Eighth Circuit found that the United States District Court for the District of Minnesota had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1340 (original jurisdiction of civil action arising under any Act of Congress provision for the Internal Revenue), 1345 (original jurisdiction of all civil actions, suits, or proceedings commenced by the United States), and 26 U.S.C. § 7402 (action to reduce to judgment tax assessments and foreclose tax liens against property). The Court of Appeals found it had appellate jurisdiction pursuant to 28 U.S.C. § 1291, and found that appellants timely filed a notice of appeal. Fed.R.App.P. 4(a)(1).

REASONS WHY THE WRIT SHOULD ISSUE

I: The District Court erred in ordering a "reverse pierce" and imposing liability on CJS Ranch for tax obligations of the Scherpings.

Under Minnesota case law, the effect of the District Court's ruling is to find CJS personally liable for the entire amount of Loren and Lavern Scherpings' tax liability. This is erroneous for three reasons. First, because the effect of the decision is to collect the Scherpings' taxes from CJS, the action against CJS on the alter ego issue is barred by 26 U.S.C. § 6502 which requires that CJS be served within six years of the assessment against the Scherpings. The courts have distinguished actions seeking to follow assets,

fraudulently conveyed, to collect a judgment against a taxpayer, and actions seeking primary liability against a transferee to collect taxes owed by the transferor. *Hall v. United States*, 403 F.2d 344 (5th Cir. 1965); *United States v. Updike*, 281 U.S. 489 (1930). The alter ego finding imposed liability upon CJS for the unpaid taxes of the Scherpings, and as a result, 26 U.S.C. § 6502 required CJS to be served within the limitation period.

Secondly, the District Court erred by concluding that the Minnesota courts would recognize a creditor's "reverse pierce". A normal "pierce of the corporate veil" arises to hold a shareholder personally liable for his corporation's obligations when the shareholder has abused the corporate process. No Minnesota case has ever granted a creditor the benefit of a reverse pierce to switch the process by making a business entity liable for the shareholder's debts. Only two Minnesota cases have even recognized a reverse pierce and both were remedial in nature: One to further the public policy behind no-fault insurance coverages, *Roepke v. Western National Mutual Insurance Co.*, 302 N.W.2d 350 (Minn. 1981); and the other to extend the homestead exemption to actual owners of the property. *Cargill, Inc. v. Hedge*, 375 N.W.2d 477 (Minn. 1985). Otherwise, the Minnesota Supreme Court has narrowly limited reverse pierces to the facts peculiar to those two cases and the lower courts had consistently refused to extend the remedy, particularly in a creditor's context.

Third, the Minnesota Supreme Court has established certain tests for the remedy, none of which applies in this case. The first test requires strong policy reasons favoring a pierce, which at least one court has found inapplicable to assist a creditor in collecting a debt.

In re Bellanca Aircraft Corp, 56 B.R. 336, 399, n. 62 (Bankr. D. Minn. 1985). The second test requires a close degree of identity between the dominant shareholders and their corporation. In Minnesota, all alter ego cases have involved 100% share ownership by the shareholder or by the shareholder and his spouse. In this case, the two taxpayers held only two-thirds of the shares of beneficial interest of CJS between them and contributed only 45% of the assets into the trust. The third test is that no other shareholder or creditor be harmed by the pierce. In this case, a reverse pierce against CJS had exposed the 55% contribution of a totally separate shareholder, the 87-year old Laura Scherping, to the government's judgment. The judgment ordered a sale of all CJS's property including Laura Scherping's 220-acre contribution to the trust. Although perfectly consistent with an alter ego finding which disregards the entity to hold the entity fully liable for the debtor's obligations, the District Court's holding is patently inconsistent with Minnesota law which precludes reverse pierce relief when innocent shareholders will be harmed.

II: The Scherpings were not rendered insolvent by the transfer of their real property to the Epsilon business trust and so could not have conveyed this real property fraudulently as this term is defined in Minnesota Statutes, Section 513.26 (1979).

The United States continues to claim that despite minimal tax liabilities for tax year 1979, the Scherpings' transfer in 1979 of approximately 180 acres into the Epsilon Company, a business trust, must be fraudulent or a sham when the tax liabilities at issue were assessed years later. The government has rightly asserted that the

Scherping brothers were convicted of tax evasion, but the single conviction on one of seven counts in the indictment relates to activity that began in 1983.

The conveyance of 180 acres of farmland cannot be denominated as fraudulent under the Minnesota Fraudulent Conveyance Act. The government had to prove *actual intent* under the applicable statute in 1979. Intent may not be presumed under Minnesota Statutes, Section 513.26 (1979) where the ostensible debtor is not or has not been rendered insolvent. For example, in *Citizens State Bank of Hayfield v. Leth*, 450 N.W.2d 923 (Minn. Ct. App. 1990), the court held that the debtor had "no remaining assets after the transfer to the trust," at 926. Also, in *Leth*, the debtor well understood "the financial problems facing his corporation," id.

Dannheim Development v. Mogler, 412 N.W.2d 398 (Minn. Ct. App. 1987), supplies the controlling law as to intent in this case, namely, that the government as a creditor attempting to attach the Scherping brothers' land must show that the Scherpings had actual personal intent to delay or defraud their creditors at the time of the transfer. A preferential transfer of property to an entity which would hold the property for the grantors' benefit is not sufficient to make out a case for a fraudulent transfer. In *First National Bank of Cold Spring v. Jaeger*, 408 N.W.2d 667 (Minn. Ct. App. 1987), the Minnesota Court of Appeals indicated that an individual's insolvency is the most apparent badge of fraud.

In the present case, the Scherpings have consistently held out Epsilon Company or CJS Ranch as the actual holder of the real estate, a fact absent in the *Jaeger* case.

The trust entity to which the Scherpings transferred their acreage had as its trustees the Scherping brothers as well as their mother who had also conveyed her own real property into Epsilon Company and then into CJS Ranch. In fact, the government settled its claim against the property ultimately held by CJS Ranch which had come from Laura Scherping, releasing liens against such property. Of course, the present summary judgment order demands once again that Grandmother Scherping's land be sold to pay her sons' tax debts.

It remains uncontroverted that neither Loren nor Lavern had received any notice from the United States that the government had valid tax assessments which could be placed against their land until 1983, at least four years after their transfer of real property to Epsilon Company.

Further, the land which came from Loren and Jane Scherping into Epsilon Company had been their homestead. "A conveyance of homestead exempt property cannot be set aside by creditors as fraudulent, even if the debtor who conveys the property intends to defraud his creditors," *First National Bank of Mankato v. Wilson*, 47 N.W.2d 764, 766 (Minn. 1951). The right to convey homestead property is" absolute[, and] the purpose of the transfer and the consideration paid are immaterial," *State Bank in Eden Valley v. Euerle Farms, Inc.*, 441 N.W.2d 121,125 (Minn. Ct. App. 1989). The government may well claim that a State statute of limitations cannot apply to an action, but a State substantive rule cannot be disregarded when the United States wishes to avail itself of a state's law.

The burden has remained on the United States to offer evidence that Scherpings were insolvent at the time of their transfers of real estate into Epsilon Company; placing

this burden on the *debtor* has been characterized as reversible error, *Texas Commerce Bank v. Olson et al.*, 416 N.W.2d 456 (Minn. Ct. App. 1987).

What may or may not have happened after the transfer of real property into Epsilon Company is irrelevant to the matters presently before this Court, id. at 462. The burden has also remained on the United States to show that the Scherpings were insolvent at the time of the transfer of their real property to the Epsilon Company, *Neubauer v. Cloutier*, 122 N.W.2d 623 (Minn. 1963). The government did not provide financial records to show that Scherpings were insolvent--and could not have supported its posture with any such records.

Without sworn testimony or an affidavit or other factual material such as bank records to show irrefutably that the Scherpings were rendered insolvent by their grant of land to the Epsilon Company, the government cannot obtain what it asks. Without such proof, the District Court's decision in favor of the United States must be reversed in favor of the Scherpings who have offered substantial evidence in the form of their Affidavits and supporting exhibits to demonstrate their solvency.

Minnesota law does not include presumptions of insolvency or of actual intent to defraud creditors. A creditor, here the United States, must prove its own case, *Neubauer* at 630. In the present case, the Scherpings have offered an affidavit which clearly demarcates the times and events which are of material importance in this case. Without an initial showing of sham transactions, alter egos, and fraudulent conveyances, on the part of the United States (other than its restrained references to the Scherpings as convicted criminals which is not in any sense probative

evidence given the dates for which these two brothers were convicted of conspiracy to evade income taxes,), the government offers no proof. No charges were filed against Jane Scherping, wife of Loren Scherping.

In *Thomas v. United States*, 66 F.3d 160, 160-162 (8th Cir. 1995), the Eighth Circuit held that a tax lien is effective only against property "belonging to such person" against whom the tax lien is filed and that the "lien attaches to property interests owned by the taxpayer, not property interests vulnerable to the taxpayer's judgment creditors," at 162. Given that the Scherpings have shown, without rebuttal by the United States, that Epsilon and then CJS Ranch has a State-sanctioned property interest, the tax liens which might reach the Scherpings' property interests ought not reach the real property now held by CJS Ranch.

CONCLUSION

For all these reasons, the decision of the United States Court of Appeals for the Eighth Circuit should be reversed and judgment granted with respect to the Scherpings, finding that the transfer of their real property was legal under Minnesota law. With respect to CJS Ranch, this Court must remand for filing of judgment in favor of CJS Ranch such that the real property shall be completely vested in CJS Ranch, subject to no liabilities of the Defendants-Scherpings. This United States Supreme Court should also find that the reverse pierce analysis reached by the District Court does not reflect Minnesota law.

Dated at St. Paul, Minnesota, this 5th day of November, 1999.

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UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

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No. 98-2009
187 F.3d 796, 84 A.F.T.R.2d 99-5546,
99-2 USTC P 50,758

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United States of America,
Appellee,

v.

Laverne Scherping; Loren Scherping;
Jane Scherping; Epsilon Company; C.J.S. Ranch,
Appellants.

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Appeal from the
United States District Court
for the District of Minnesota

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Filed: Aug. 11, 1999
Submitted: Feb. 9, 1999

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Lawrence H. Crosby and John R. Koch, for Appellants.
Sara Ann Ketchum, Jonathan S. Cohen and Loretta C. Argrett, for Appellee.

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Before: McMILLIAN, LAY and MURPHY, Circuit Judges.

McMILLIAN, Circuit Judge.

Appellants are two brothers, Laverne Scherping and Loren Scherping, Loren's wife, Jane Scherping, and two business trusts, Epsilon Co. and C.J.S. Ranch. Appellants

appeal from a summary judgment entered in the United States District Court[1] for the District of Minnesota in favor of the United States (government), holding that the government was entitled to foreclose its tax liens upon appellants' property to satisfy their tax liabilities. United States v. Scherping, Civil File No. 97-2282 (PAM/JGL) (D.Minn. Mar. 9, 1998) (memorandum and order). For reversal, appellants argue that the district court erred in: (1) finding the collection action was not barred by the 6-year statute of limitations, (2) ordering a "reverse pierce" and imposing liability upon C.J.S. Ranch for tax obligations of the Scherpings, and (3) finding that the transfer of their property to Epsilon Co. was fraudulent because the transfer did not render them insolvent. For the reasons discussed below, we affirm the judgment of the district court.

JURISDICTION

The district court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1340 (original jurisdiction of civil action arising under any Act of Congress provision for the Internal Revenue), 1345 (original jurisdiction of all civil actions, suits, or proceedings commenced by the United States), and 26 U.S.C. § 7402 (action to reduce to judgment tax assessments and foreclose tax liens against property). This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Appellants timely filed a notice of appeal. Fed.R.App.P. 4(a)(1).

FACTUAL BACKGROUND

This case has a long, checkered history, involving numerous tax court proceedings. Laverne Scherping and

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[1] The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota.

Loren Scherping (taxpayers), who are brothers, unsuccessfully appealed the two tax court cases from which this collection action arises to this court. See Scherping v. Commissioner, 747 F.2d 478, 480 (8th Cir.1984) (per curiam) (Laverne Scherping); Scherping v. Commissioner, 725 F.2d 689 (8th Cir.1983) (table) (Loren Scherping). This collection action was filed in September 1989; the case was stayed pending a criminal tax investigation of taxpayers and James Noske and Joan Noske, involving some of the entities in issue here. Taxpayers were convicted on one count of conspiracy to evade income taxes with respect to some of the transactions in issue here, which convictions taxpayers unsuccessfully appealed. United States v. Noske, 117 F.3d 1053, 1056 (8th Cir.), cert. denied, --- U.S. ----, ----, 118 S.Ct. 315, 389, 139 L.Ed.2d 244, 304 (1997).

After the completion of the criminal tax proceedings, the government sought to reduce to judgment taxpayers' tax assessments for tax years 1979 and 1980, and to foreclose its federal tax liens on property owned by the taxpayers and purportedly conveyed by them to the two business trusts, Epsilon and C.J.S. Ranch.

By deeds dated December 21, 1972, January 2, 1973, and January 4, 1974, Lawrence and Laura Scherping, taxpayers' parents, conveyed approximately 200 acres of farm land property to taxpayers which had a fair market value in excess of $200,000. On August 7, 1979, taxpayers transferred the same farm property to Epsilon for consideration of ten dollars ($10.00) and other good and valuable consideration. Taxpayers received shares in Epsilon. The trustees of Epsilon were taxpayers and their mother, Laura Scherping. Evidence showed that after the transfer, Loren and Jane Scherping not only continued to live on the farm property, but also farmed the property and paid

insurance and all of the utility bills. Moreover, the same farm property was Epsilon's only asset and Epsilon maintained no bank account, financial records, or balance sheets and filed neither federal or state tax returns.

In October 1982 the government sent notices to taxpayers of deficiencies for tax years 1979 and 1980, asserting taxes and penalties in the amount of $94,223 against Laverne Scherping, against Loren and Jane Scherping for tax year 1979 for $33,683, and against Loren Scherping for tax year 1980 for $51,418. Taxpayers contested in tax court each of the notices and their petitions were dismissed for failure to state a claim. The tax court noted that taxpayers were part of an unending parade of taxpayers bent on flooding the tax court's docket with frivolous claims. Thereafter, the tax court determined the liabilities and additions to the taxes as set forth in the notice of deficiencies. This court dismissed or affirmed taxpayers' appeals. Scherping v. Commissioner, 747 F.2d at 480; Scherping v. Commissioner, 725 F.2d 689. These are the same assessments which the government seeks in this suit to reduce to judgment and to collect.

Subsequent to the transfer by taxpayers and their mother of the farm property to Epsilon on January 13, 1983, taxpayers and Laura Scherping, as trustees of Epsilon, recorded two deeds dated June 15, 1982, purporting to convey the same farm property to Epsilon. Finally, by deed, reciting for consideration of $1,000 or less, Epsilon, by taxpayers and Laura Scherping, purported to convey the same farm property to C.J.S. Ranch. Epsilon received no consideration for the transfer. C.J.S. Ranch had no other assets and did not maintain a bank account. Once again, as after the Epsilon conveyance, Loren and Jane Scherping continued to live on the property, farmed it, and paid no rent.

After the completion of the criminal tax cases, the government moved to reopen this case and for summary judgment, asking the district court to order a sale of the farm property transferred by taxpayers to C.J.S. Ranch because Epsilon and C.J.S. Ranch were alter egos of taxpayers and because the transfers of the same farm property to Epsilon and C.J.S. Ranch were fraudulent under Minn. Stat. §§ 513.25 and 513.26. Taxpayers filed an opposition to the government's motion and their own affidavits. Taxpayers argued that the collection action was untimely, that Minnesota law does not allow "reverse" piercing of the corporate veil, and that the transfers to the business trusts were not sham transactions or fraudulent conveyances.

The district court granted summary judgment in favor of the government and ordered the property to be sold (not including the 240 acres owned by C.J.S. Ranch that had been formerly owned by Laura Scherping) and the proceeds of the sale to be paid over to the government (and any excess proceeds to be paid to taxpayers after expenses and costs of sale). The district court rejected the statute of limitations argument, holding that the liens filed against C.J.S. Ranch were not assessments of tax against C.J.S. Ranch but against taxpayers and Jane Scherping. See Op. at 800-01 (noting that the government timely filed a suit against taxpayers and that, once suit is timely filed, proceeding to judgment was not curtailed by statute of limitations). The district court also held that, under Minnesota law, the trusts were alter egos of taxpayers because there was a close identity between taxpayers and the trusts, taxpayers were not innocent individuals, and application of the alter ego theory would prevent the very sort of fraud and injustice that the alter ego doctrine seeks to avoid, and rejected taxpayers' argument that Minnesota courts would refuse to apply the "reverse"

piercing-the-corporate-veil doctrine under these circumstances. See id. at 801-04. The district court also held, in the alternative, that the transfers by taxpayers to Epsilon and C.J.S. Ranch in 1979 and 1982, respectively, were fraudulent conveyances under Minnesota law. See id. at 804-05. This appeal followed.

STANDARD OF REVIEW

This court reviews a grant of summary judgment de novo. See, e.g., Dillon v. Yankton Sioux Tribe Housing Authority, 144 F.3d 581, 583 (8th Cir.1998). Fed.R.Civ.P. 56(c) provides that summary judgment shall be granted where the record reveals that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 246, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Postscript Enterprises v. City of Bridgeton, 905 F.2d 223, 225 (8th Cir.1990).

STATUTE OF LIMITATIONS

First, taxpayers argue that the district court erred in holding that this action was not barred by the 6-year statute of limitations. Title 26 U.S.C. § 6502, as in effect at the relevant time, provided in pertinent part:

> (a) Length of period. -- Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun--

> (1) within 6 years after the assessment of the tax, or
>
> ....
>
> If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

Here, it is undisputed that this collection action was timely filed within the 6-year statutory period. The government filed the notices of federal tax liens in 1984; this collection action was filed in 1989, within the 6-year statutory period, although the government failed to make effective service on C.J.S. Ranch at that time. Eight years later, in 1992, the government amended its complaint to add C.J.S. Ranch as a party. Taxpayers argue that C.J.S. Ranch was improperly added as a party because the collection was not begun against it until 1992, more than 6 years after the assessment of tax in 1984. Taxpayers argue that because C.J.S. Ranch is allegedly their alter ego, C.J.S. Ranch stands in their shoes and the government had to file the collection action against it within 6 years. For that reason, taxpayers argue that the collection action is one against C.J.S. Ranch for primary liability and not, as the district court found, for collateral liability to collect a judgment against taxpayers. We disagree.

Taxpayers' reliance on Hall v. United States, 403 F.2d 344 (5th Cir.1968), cert. denied, 394 U.S. 958, 89 S.Ct. 1306, 22 L.Ed.2d 560 (1969), and United States v. Updike, 281 U.S. 489, 50 S.Ct. 367, 74 L.Ed. 984 (1930), is

misplaced. We note that Hall expressly holds that § 6502 is inapplicable to bar a suit against third persons in aid of collecting a judgment against a taxpayer. See 403 F.2d at 346. Here, there is no doubt that C.J.S. Ranch is a third person. Updike held an action against transferees to be barred by the predecessor statute to § 6502 where no proceeding to collect the tax had been commenced within the statutory period, relying on statutory language regarding collection of assessments against transferees of the taxpayers (in contrast, the assessments here were against the taxpayers, not the transferees). See 403 U.S. at 492-96, 91 S.Ct. 2022. As noted above, in the present case there is no dispute that the suit against taxpayers was timely filed, so Updike is inapplicable here. Moreover, neither Hall nor Updike involved an alleged third party which was found to be an alter ego of the taxpayer against whom a timely suit had been filed. Contrary to taxpayers' argument, the government did not seek to reduce to judgment any tax assessment made against C.J.S. Ranch, nor does the record anywhere include such a judgment. The district court's order reducing the assessment to judgment states that the assessments in issue are against Laverne, Loren, and Jane Scherping, and are based upon the tax court's decisions against those individuals and not against C.J.S. Ranch.

ALTER EGO

On the merits, taxpayers argue that the district court erred in "reverse" piercing the corporate veil to hold C.J.S. Ranch liable for their individual tax liabilities. Taxpayers argue that Minnesota courts would not extend the alter ego doctrine as a creditor's remedy beyond its traditional context, that is, to hold the individual liable for corporate debts. Taxpayers argue that the two Minnesota cases applying the reverse piercing doctrine were remedial and

limited to the specific facts, citing Roepke v. Western National Mutual Insurance Co., 302 N.W.2d 350 (Minn.1981) (Roepke) (no fault insurance), and Cargill, Inc. v. Hedge, 375 N.W.2d 477 (Minn.1985) (Cargill) (homestead exemption). Taxpayers also argue that, even assuming Minnesota courts would extend the reverse piercing doctrine to the collection of tax, the test for application of the doctrine was not met here because there are no strong policy reasons to do so, the degree of identity between taxpayers and the trusts is less than 50%, and application of the doctrine would harm an innocent individual, taxpayers' mother, Laura Scherping. We disagree.

The government may collect the tax debts of a taxpayer from assets of the taxpayer's nominee, instrumentality, or "alter ego." See G.M. Leasing Corp. v. United States, 429 U.S. 338, 350-51, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977); Horton Dairy, Inc. v. United States, 986 F.2d 286, 291 (8th Cir.1993); F.P.P. Enterprises v. United States, 830 F.2d 114, 117-18 (8th Cir.1987). In determining the economic reality of a transaction, courts must analyze the substance of a transaction and are not restricted by its form. See, e.g., Gregory v. Helvering, 293 U.S. 465, 469-70, 55 S.Ct. 266, 79 L.Ed. 596 (1935); Estate of Sachs v. Commissioner, 856 F.2d 1158, 1164 (8th Cir.1988). While taxpayers are permitted to reduce their tax burden by any lawful means available, they are not permitted "to construct paper entities to avoid taxation when those entities are without economic substance." Chase v. Commissioner, 59 T.C.M. (CCH) 261, 264, 1990 WL 33360 (1990) (citations omitted), aff'd, 926 F.2d 737 (8th Cir.1991).

When an entity is without economic substance, it may be deemed to be the "alter ego" of the taxpayer. "Alter ego means 'other self'-- where one person or entity acts like, or, for another to the extent that they may be considered identical." Loving Saviour Church v. United States, 556 F.Supp. 688, 691 (D.S.D.1983), aff'd, 728 F.2d 1085 (8th Cir.1984) (per curiam). "Property held in the name of an entity which is the alter ego of a taxpayer may be levied on to satisfy the tax liabilities of the taxpayer." F.P.P. Enterprises, 830 F.2d at 118 (upholding finding that trusts created by taxpayers were the alter egos of taxpayers, and therefore not separate persons apart from taxpayers).

Generally, federal courts will look to state law to determine whether an entity is an alter ego of a taxpayer. See Loving Saviour Church, 728 F.2d at 1086 (citing Aquilino v. United States, 363 U.S. 509, 512-13, 80 S.Ct. 1277, 4 L.Ed.2d 1365 (1960)). In Victoria Elevator Co. v. Meriden Grain Co., 283 N.W.2d 509, 513 (Minn.1979) (Victoria Elevator), the court held that where a shareholder "did not treat the corporation as a separate legal entity, he should not be entitled to its protection against personal liability." In determining whether an entity is the alter ego of an individual, Minnesota courts, since Victoria Elevator, have employed a two- step analysis. In the first step, the court considers the relationship between the individual and the entity (typically a corporation), focusing on such factors as the "failure to observe corporate formalities, nonpayment of dividends, ... siphoning of funds [by the individual], ... absence of ... records [for the entity], and the existence of [the entity] as merely a facade for [the individual]." White v. Jorgenson, 322 N.W.2d 607, 608 (Minn.1982). "Disregard of the corporate entity requires not only that a number of these factors be present, but also that there be an element of injustice or fundamental unfairness." Victoria

Elevator, 283 N.W.2d at 512. Thus, in the second step, the court considers the relationship between the entity and the party that seeks to disregard it; only if the entity has operated in a fraudulent or unjust manner toward that party will the entity be disregarded. See BBCA, Inc. v. United States, 630 F.Supp. 349, 351 (D.Minn.1986) (BBCA) (noting that proof of strict common law fraud is not required) (citing White v. Jorgenson, 322 N.W.2d at 608). "[W]here the formalities of corporate [or, as in the present case, trust] existence are disregarded by one seeking to use it, ... [the] existence [of the corporation or trust] cannot be allowed to shield the individual from liability for damages incurred by those dealing with the corporation [or for taxes owed by the individual]." Victoria Elevator, 283 N.W.2d at 512.

We hold that the district court properly concluded, based on the undisputed facts, that Epsilon and C.J.S. Ranch were sham entities created on behalf of and used by taxpayers to evade payment of their federal income tax liabilities. Indeed, taxpayers even admitted in their depositions that they, together with their mother, Laura Scherping, were trustees of Epsilon; that they received no compensation for the transfers other than shares in the trust; that Epsilon received no compensation whatsoever for the transfer to C.J.S. Ranch; that Loren and Jane Scherping continued to live on the property and taxpayers continued to farm the property, after both transfers; and that neither Epsilon nor C.J.S. Ranch had any other assets or maintained separate checking accounts.

Although taxpayers were not trustees of C.J.S. Ranch, they, together with their mother, Laura Scherping, held 100% of the beneficial interest in that trust. The trustees of C.J.S. were two South Dakota non-profit

corporations, Parnell, Inc., and Armageddon, Inc., that have been repeatedly recognized as vehicles for the promotion of abusive tax shelters. See Paulson v. Commissioner, 992 F.2d 789, 790-91 (8th Cir.1993) (per curiam) (Armageddon and Parnell were trustees of entity determined to be a sham where at trial the presidents of Armageddon and Parnell testified they had never heard of either entity and had not performed any act for these entities); Xemas, Inc. v. United States, 689 F.Supp. 917, 921 (D.Minn.1988) (Xemas) (Armageddon and Parnell recognized as vehicles for the promotion of abusive tax shelters), aff'd, 889 F.2d 1091 (8th Cir.1989) (table), cert. denied, 494 U.S. 1027, 110 S.Ct. 1472, 108 L.Ed.2d 610 (1990). We note that taxpayers' criminal convictions, which related to their efforts and to the efforts of their related entities to operate in a fraudulent manner by conspiring to evade the payment of federal income taxes, combined with the tax court's holding that taxpayers' other vehicle for tax avoidance, Imperial Investment, Inc ., was a sham trust, and the facts outlined above which are based on taxpayers' own statements in depositions, overwhelmingly demonstrated that Epsilon and C.J.S. Ranch were sham entities operated in a fraudulent manner vis-a-vis the government and should therefore be disregarded. See Scherping v. Commissioner, 58 T.C.M. (CCH) 1046, 1047, 1989 WL 154686 (1989) (finding Imperial was a sham entity and taxpayers' alleged transfers of asserts to Imperial was a sham).

Taxpayers next argue that the reverse piercing of the corporate veil unfairly penalized the trusts for acts over which the trusts had no control. This argument, however, ignores the fact that the district court found that the trusts were the alter egos of taxpayers, and thus not separate entities. As the Fifth Circuit explained in Zahra Spiritual Trust v. United States, 910 F.2d 240, 243-44 (1990), "[t]he

ultimate goal in a reverse piercing case is unique; rather than merely disregarding the corporate fiction and holding the shareholders accountable, the court treats the individual and the corporation as 'one and the same.' " See also F.P.P. Enterprises, 830 F.2d at 118 (upholding finding that trusts created by taxpayers were the alter egos of taxpayers, and therefore not separate persons apart from taxpayers). Taxpayers acknowledge that the present case involves reverse piercing, but they argue that the Minnesota courts would not extend the alter ego doctrine as a creditor's remedy beyond its traditional context, that is, to hold the individual liable for corporate debts. Taxpayers cite numerous cases in which Minnesota courts have rejected attempts to apply the reverse piercing doctrine as a creditor's remedy.

The government argues correctly that reverse piercing is a well- established theory in the federal tax realm. See, e.g., Zahra Spiritual Trust v. United States, 910 F.2d at 243 (applying Texas law); Shades Ridge Holding Co. v. United States, 888 F.2d 725, 728 (11th Cir.1989), cert. denied, 494 U.S. 1027, 110 S.Ct. 1472, 108 L.Ed.2d 609 (1990); Loving Saviour Church, 728 F.2d at 1086 (holding that the IRS could levy on church property to satisfy the tax liabilities of its members in appropriate circumstances); Cargill, 375 N.W.2d 477 (applying Minnesota law to reverse pierce in case involving homestead exemption); Roepke, 302 N.W.2d 350 (applying Minnesota law to reverse pierce to provide an equitable result in case involving no fault insurance). In Cargill, the issue was whether the owner-occupants of a farm, by placing their land in a family farm corporation, were entitled to use a reverse pierce of the corporate entity to assert a homestead exemption from judgment creditors. While declining to adopt an equitable interest theory, the court allowed a reverse pierce to protect

the owner-occupants' homestead exemption, holding that "the approach of a reverse pierce of the corporate veil may be used." 375 N.W.2d at 478, citing Roepke, 302 N.W.2d 350. The court emphasized the strong policy reason for a reverse pierce, namely, "the importance, notwithstanding the just demands of creditors, for a debtor's home to be a 'sanctuary.' " Id. at 479. In Roepke the court disregarded the corporate entity to further the purposes of no fault insurance. "Although title to six motor vehicles was in a corporation, ... [the court] treated the vehicles as if they had been owned by the deceased, sole shareholder of the corporation, so that the decedent could be deemed an 'insured' under the no- fault policy for the purpose of survivors' benefits." Id. (discussing Roepke).

We believe that the present case meets the standards established in Cargill and Roepke. Contrary to taxpayers' argument, there are strong policy reasons for reverse piercing the corporate veil in the present case, that is, avoiding fraud and collecting delinquent federal taxes. In addition, contrary to taxpayers' argument, there is a strong degree of identity between the "guilty" individuals and the entities to be disregarded. The trusts in issue here did nothing other than hold title to real property. The district court properly looked only to the real property transferred to the trusts by taxpayers, who were hardly innocent individuals needing protection. The interests of taxpayers' mother are not harmed because, in addition to the language in the district court's order, there is an agreement in effect in which the government has agreed not to seek to collect taxpayers' liability from the property transferred by her. Thus, contrary to taxpayers' contention, the reverse pierce here does not harm any innocent individual.

FRAUDULENT CONVEYANCE

Finally, we consider taxpayers' argument that the district court erred in holding that the transfers of the property to Epsilon and C.J.S. Ranch were fraudulent under Minnesota law. Taxpayers argue that the transfers could not have been fraudulent because they were not insolvent at the time of the transfers. Whether a conveyance may be set aside as fraudulent must be determined in accordance with state law. See Loving Saviour Church, 556 F.Supp. at 691. The Minnesota Uniform Fraudulent Conveyance Act in effect at the time of the alleged transfers to Epsilon in 1979 and to C.J.S. Ranch in 1982 was contained in Minn. Stat. §§ 513.20-.32 (These sections were repealed in 1986 and replaced in part with Minn. Stat. § 513.44.)

Minnesota Uniform Fraudulent Conveyance Act provided several alternative theories under which a creditor may set aside a fraudulent conveyance. The government argues that it did not seek to prove that the transfers were fraudulent conveyances under the section that required proof of insolvency, Minn. Stat. § 513.23; rather, the government (and the district court) relied on two sections, § 513.25 (conveyance by a person about to incur debt),[2] and § 513.26 (conveyance made with intent to defraud),[3] in which insolvency was just one factor to be considered in

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[2] Minn.Stat. § 513.25 provided: "Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he [or she] will incur debts beyond his [or her] ability to pay as they mature, is fraudulent as to both present and future creditors."

[3] Minn.Stat. § 513.26 provided: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

determining whether a transfer was made with actual intent to defraud.

As the district court properly noted, actual intent for the purpose of § 513.26 may not be presumed. See slip op. at 13. One may establish actual intent through the examination of circumstantial evidence or "badges of fraud." Citizens State Bank v. Leth, 450 N.W.2d 923, 927 (Minn.Ct.App.1990) (Leth) (applying Minn. Stat. § 513.44). Under Minnesota law, although the creditor bears the initial burden of proving fraud, if a creditor demonstrates sufficient badges of fraud, the burden of production shifts to the party contending that a fraudulent conveyance has not occurred. See Argonaut Insurance Co. v. Cooper, 395 N.W.2d 119, 121-22 (Minn.Ct.App.1986) (Argonaut) (applying Minn. Stat. § 513.26); accord Xemas, 689 F.Supp. at 922 (applying Minn. Stat. §§ 513.23, 26). The badges of fraud which courts are to consider when determining actual intent include, but are not limited to: "adequacy of consideration, confidential relationship between grantor and grantee, ... retention of possession of the property by the debtor, failure to testify or produce available explanatory or rebutting evidence when circumstances attending to transfer are suspicious," Argonaut, 395 N.W.2d at 122, failure to record the transfer or conveyance documents, prospective debts or threats of suit, and the insolvency of the debtor either before or as a result of the transaction. See Leth, 450 N.W.2d at 927. Minn.Stat. § 513.44(b) lists as factors to be considered whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit (id. § 513.44(b)(4)); whether the transfer was of substantially all of the debtor's assets (id. § 513.44(b)(5)); and whether the transfer occurred shortly before or shortly after a substantial debt was incurred (id. § 513.44(b)(10)).

Here, we agree with the district court that there was sufficient circumstantial evidence that the transfers were fraudulent. It is undisputed that both transfers were made for inadequate consideration. Furthermore, taxpayers admitted that they continued to farm the property after each transfer and that Loren and Jane Scherping continued to live on the property after each transfer. As discussed above, the district court correctly found that both Epsilon and C.J.S. Ranch were taxpayers' alter egos. Thus, it is clear that taxpayers retained control over the property. See Op. at ----. The trusts did not maintain separate financial records or bank accounts. In addition, as noted above, taxpayers made deliberate efforts to evade tax and they were found guilty of conspiracy for tax evasion. See id.

Likewise, we note that the undisputed facts show that both transfers occurred shortly before or shortly after taxpayers acquired substantial debts. It is well established that, regardless of when federal taxes are actually assessed, the United States is a creditor on the date a return is due to be filed and the taxes are required to be paid for each period. See, e.g., Hartman v. Lauchli, 238 F.2d 881, 887 (8th Cir.1956), cert. denied, 353 U.S. 965, 77 S.Ct. 1048, 1 L.Ed.2d 915 (1957). The tax liabilities in issue here were those for tax years 1979 and 1980. Thus, taxpayers incurred the indebtedness in issue as of April 15, 1980, and April 15, 1981, that is, shortly after the initial transfer of the property to Epsilon and shortly before the second transfer to C.J.S. Ranch. Moreover, we note that taxpayers admit that they did not file the trust agreement for Epsilon, which is the trust they contend owned the property after 1979, with the Minnesota Secretary of State until June 1982, shortly after incurring those debts. The assessments were made on September 27, 1983, shortly after the date of the alleged transfer to C.J.S. Ranch, and shortly before the recording of

the deed. Moreover, the sham transfer of taxpayers' remaining assets to Imperial took place on May 24, 1983, shortly after the Tax Court dismissed taxpayers' petition for the tax years in issue here. See Scherping v. Commissioner, 58 T.C.M. (CCH) at 1047. Thus, on the undisputed facts, taxpayers engaged in an extensive pattern of transferring all of their assets shortly before or shortly after various events occurred relating to their accumulation of substantial tax debts.

Finally, the assets that taxpayers point to show that they were not insolvent after the transfers were their cattle and farm equipment, which they transferred to a third sham entity, Imperial, at approximately the same time of the second transfer to C.J.S. Ranch. Consequently, taxpayers were insolvent at the conclusion of all the transfers, and they were rendered insolvent by the transfer to C.J.S. Ranch. See Minn.Stat. § 513.42(d) (for purposes of determining the solvency or insolvency of a debtor, assets that have been fraudulently transferred are not included in the calculation of assets); FDIC v. United States, 654 F.Supp. 794, 810 (N.D.Ga.1986) (assets hidden from creditors not available to creditors and may not be considered in support of solvency claim). Thus, taxpayers had no remaining assets after the transfers to the two trusts.

In sum, we hold that the present collection action was not barred by the 6-year statute of limitations, the trusts were the alter egos of taxpayers and were liable for taxpayers' tax liabilities under the reverse pierce doctrine, and the transfers to the trusts were fraudulent conveyances under Minnesota law.

Accordingly, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil File No. 97-2282 (PAIWJGL)

United States of America,
Plaintiff,

v.

Laverne Scherping; Loren Scherping;
Jane Scherping; "Epsilon Company"; and
C.J.S. Ranch Trust,
Defendants.

MEMORANDUM AND ORDER

This matter is before the Court upon Plaintiff United States of America's Motion for Summary Judgment. For the following reasons, the Court grants the motion.

PROCEDURAL BACKGROUND

On April 11, 1996, Defendants Laverne and Loren Scherping were convicted of tax related crimes following a jury trial. Specifically, the Scherping brothers were convicted of conspiracy to evade the payment of their federal tax liabilities. See United States v. Joan M. Noske, 117 F.3d 1053, 1056 (8th Cir. 1997), cert. denied, Scherping v. United States, 118 S.Ct. 315, and cert. denied, Scherping v. United States, 118 S.Ct. 389 (1997).

Prior to this criminal trial, the United States had filed a complaint against Laverne and Loren on September

18, 1989, asserting that the United States should be permitted to foreclose its federal tax liens against the real property at issue. (See Clerk Doc. No. 1) On May 26, 1992, the Honorable Harry H. MacLaughlin granted the government a partial summary judgment against Defendants Loren, Laverne and Jane Scherping (Loren's wife) for IRS assessments for tax years 1979, 1980, and 1981. (See Clerk Doc. No. 80.) The remaining issues in this case relate to the United States' efforts to satisfy the outstanding judgments against each of the Defendants by foreclosing its tax liens against approximately 200 acres of farm property purported to be owned by C.J.S. Ranch Trust ("CJS"). On July 2, 1992, the civil case was stayed until April 8, 1997, when the Court entered a revised discovery scheduling order. (See Clerk Doc. No. 104.) The discovery period closed on December 29, 1997. Plaintiff has now filed this motion for summary judgment.

FACTUAL BACKGROUND

In the early 1970's, the Scherping brothers, Laverne and Loren, received approximately 200 acres of farm property[1] from their parents pursuant to three deeds. (See Pl.'s Exs. 3-5.) This is the property currently in question. Conversely, the federal tax lien does not attach to the 240 acres of real estate owned by CJS and formerly owned by Laura Scherping (Loren and Laverne's mother) described specifically as:

> The North Half of the Northeast Quarter (N 1/2 NE 1/4) of Section Numbered Fourteen (14), in Township Numbered One Hundred Twenty-five (125) North, of Range

[1] The property's fair market value is in excess of $200,000.

Numbered thirty-two (32) West, of the Fifth Principal Meridian, Steams County, Minnesota. AND The Southwest Quarter of the Southwest Quarter (SW 1/4 SW 1/4) of Section Twelve (12) except three tracts described as follows: 18.26 acres as described in Deed recorded in Book 48 of Deeds page 377; Commencing at the Northeast comer of said quarter, thence South Forty-four (44) rods, thence West Eight (8) rods, thence North to a point Six (6) rods West of the Northeast comer of said SW 1/4 of SW 1/4, thence East Six (6) rods to the place of beginning; The North 1 ½ rods of the land hereby described containing 19.39 acres, more or less, according to the Government Survey thereof; Also, the West Half of the West Half of the Northeast Quarter (W ½ W ½ NE 1/4) of Section Thirteen (13), the North Quarter of the North Half of the Southeast Quarter (N 1/4 N ½ SE 1/4) and the South Half of the Northeast Quarter (S ½ NE 1/4) of Section Numbered Fourteen (14) all of the foregoing being in Township Numbered One Hundred Twenty-five (125) North, of Range Numbered Thirty-two (32) West of the Fifth Principal Meridian, Stearns County, Minnesota.

(Am. Compl. ¶ 20.) The property the government is attempting to foreclose is approximately 200 acres described fully in the deeds attached to the Plaintiffs Original Complaint as Exhibits A-1, A-2, A-3, B- 1, B-2, B-3 and D.

In the late 1970's, Laverne and Loren purported to convey the same farm property to Epsilon Company Trust ("Epsilon")[2] for "[t]en dollars and other good and valuable considerations." (Def's Ex. 6.) Epsilon Company consisted of three trustees: Laverne, Loren, and their mother, Laura.[3] The actual consideration received by Loren and Laverne for the transfer of property was 100% of the outstanding shares in the Epsilon Company Trust. Despite the purported transfer, Loren continued to live on and farm the property, while the trustees as individuals paid the insurance and utilities. (See Loren Scherping Dep. at 18, 33; Laverne Scherping Dep. at 22, ¶¶ 12-17.) The only asset held by Epsilon was the farm property. In addition, the company did not maintain bank accounts, financial records or balance sheets. (See Laverne Scherping Dep. at 22, 35.)

Again, in June of 1982, Defendants Loren, Laverne, Laura and Jane Scherping, as "Trustees of Epsilon Company," purported to convey the same farm property to Epsilon Company. The deed states that the "total consideration for the transfer of this property is $1,000 or less." (Def.'s Ex. 9.) After this transfer, the Defendants continued to live and farm on the property and pay utilities and insurance.

The final transfer of this farm property occurred on August 18, 1982, when the Epsilon Company, by its trustees, Laverne, Loren, and Laura, executed a deed

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[2] The Epsilon Company was dissolved in October of 1989, one month after the government filed its Complaint.

[3] Laura Scherping had no ownership interest in the property because she transferred her property rights when she and her husband conveyed the property to their sons in the early 1970's. (See Laverne Scherping Dep. at 9.)

transferring the property to CJS. (See Def.'s Ex. 10.) CJS is another business trust formed by Defendants. Epsilon received no consideration for this transfer. Instead, Laverne, Loren, and Laura each received 1/3 of the outstanding trust certificates for CJS. Though the conveyance occurred in 1982, the transfer was not recorded until November 15, 1983. The date of recording is more than one year after the transfer and after the IRS assessed each of the Defendants for their income tax liabilities. Upon transfer, Loren and Jane continued living on the property, without payment of rent to CJS. (See Laverne Scherping Dep. at 29, 40.) In addition, Defendants continued to farm the property. (See id. at 32.)

DISCUSSION

The government seeks to set aside the transfers of the 200 acres of farm property by the taxpayer Defendants to Epsilon Corporation and then to CJS. The government asserts that although the property at issue is titled in the name of CJS, it is actually Loren and Laverne's property and may be used to satisfy their tax liability under one of three theories: (1) CJS is the alter ego of Defendants; (2) the conveyances to Epsilon Company Trust and to CJS were sham transactions; and (3) the conveyances were fraudulent under Minnesota Statute sections 513.20-513.32.

A. Standard of Review

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); Celotex 477 U.S. 317 (1986); Unigroup Inc. v. O'Rourke Storage & Transfer Co., 980 F.2d 1217, 1219-20 (8th Cir. 1992). The judge's function at the summary

judgment stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). That some facts are in dispute is not dispositive. The Court determines materiality from the substantive law governing the claim. See id. at 248. Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. See id. A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. See id. at 248-49. The Court first turns to discuss the theory of alter ego.

B. Alter Ego

The government argues that CJS is liable for the Scherpings' tax liabilities as the "alter ego" of the Scherpings. CJS asserts that the alter ego theory cannot be used in this instance for two reasons: (1) CJS is only joined as party in this suit for purposes of fraudulent conveyance; and (2) Minnesota law does not recognize the remedy of "reverse pierce." (1) CJS is only joined as party to this suit for purposes of fraudulent conveyance; and (2) Minnesota law does not recognize the remedy of "reverse pierce."

1. CJS is a party to this lawsuit

In 1984, the United States filed assessments against CJS for the Scherpings' tax obligations. However, the government did not sue CJS within the six year statute of limitations. See 26 U.S.C. § 6502.[4] In 1992, Judge MacLaughlin permitted the United

[4] Though under the current 26 U.S.C. § 6502, the period of limitations is extended to ten years, the version of § 6502 applicable to the assessments at issue here allowed for a six year collection period.

States to join CJS saying,

> CJS Ranch is involved in this action only because the government claims it holds title to property that the Scherpings once owned and fraudulently conveyed to the Ranch. If the property was fraudulently conveyed, the conveyance may be set aside and the government may then foreclose against the property the tax lien that arose against all the Scherpings' property when the tax assessments were made. Because the claim against [CJS] is not an action to collect taxes owed by [CJS], the limitations period of 23 U.S.C. § 6502 does not apply to the Ranch.

(Clerk Doc. No. 77.)

Therefore, CJS asserts that any tax liability it has cannot be an issue before this Court. The government argues that CJS mischaracterizes Judge MacLaughlin's Order, pointing to the following pertinent language, "[CJS] confuses the nature of this suit. In its complaint, the government seeks to reduce to judgment tax assessments made against the Scherpings; the government is not seeking to reduce to judgment any assessments that may exist against CJS Ranch." Id. at 4. Moreover, Judge MacLaughlin held that "[i]t is undisputed that the government's action to reduce to judgment the Scherpings' tax assessments was brought within the limitation period prescribed by 26 US.C. § 6502." Id. at 4 n.3.

The government has joined CJS as a party, not to reduce to judgment any assessments against CJS, but in an attempt to seek judgment from the Scherpings. Though the

government has filed a nominee lien against CJS, that lien does not equal an assessment of tax against CJS. See F.F.P. Enters. v. United States, 830 F.2d 114, 117-18 (8th Cir. 1987); Matrix Dev. Com. v. United States. 815 F.Supp. 297 (E.D. Wis. 1993). Judge MacLaughlin specifically held that the government timely filed a suit against the Scherpings. Once the suit was filed, proceeding to judgment was not curtailed by the statute of limitations. Moreover, the court never intimated that the lawsuit was solely for the purposes of fraudulent conveyance, nor that the United States could not advance under the alter ego theory of recovery. Accordingly, the Court finds that the present suit which includes CJS is correctly before the Court.

2. Reverse pierce

The government asserts that the assets of CJS could be used to satisfy the tax liabilities of the Scherpings under the alter ego/nominee theory. The remedy of veil piercing occurs when the corporate entity is disregarded and a shareholder or shareholders are held individually liable for a corporation debt. Therefore, Defendants claim that the case before this Court is in actuality one of reverse veil piercing, where the corporation will be held liable for an individual's debts. In furtherance of this argument, Defendants argue that Minnesota law does not recognize the theory of reverse veil piercing, relying on the policy that "[t]he major justification of the alter ego remedy is to penalize shareholders who act unjustly.... not to penalize corporations or other entities who have members with unpaid obligations." (See Def.'s Mem. Opp'n at 5.) Though the government disputes Defendants' assertion that Minnesota does not recognize reverse veil piercing, both parties agree that the determination of whether an entity is

an alter ego of a taxpayer is made by reference to state law. See Loving Saviour Church v. United States, 728 F.2d 1085, 1086 (8th Cir. 1984); United States v. Gerads, No.4-91-623, 1993 WL 114411, at *3 (D .Minn. July 26, 1993).

Defendants support their position by citing numerous cases in which Minnesota courts have rejected attempts to reverse the veil piercing remedy, specifically pointing out that no case has expanded the alter ego doctrine as a creditor's remedy. However, the government asserts that reverse veil piercing is a well established theory in the federal tax realm. See Zahra Spiritual Trust v. United States, 910 F.2d 240, 243 (5th Cir. 1990) (applying Texas law); Shades Ridge Holding Co. v. United States, 888 F.2d 725, 728 (11th Cir. 1989); Loving Saviour Church, 728 F.2d at 1086 (holding that the IRS could levy on church property to satisfy the tax liabilities of its members in appropriate circumstances); BBCA, Inc. v. United States 630 F. Supp. 349, 350 (D. Minn. 1986); Gerads, 1993 WL 11441 1, at *3-4; Cargill, Inc. v. Hedge, 375 N.W.2d 477 (1985) (applying Minnesota law); Roepke v. Western Nat'l Mut. Ins. Co., 302 N.W.2d 350 (1981) (allowing reverse piercing to provide an equitable result).

Defendants concede that Minnesota courts have allowed a reverse pierce in the limited circumstances of homestead exemption and no fault insurance. See Cargill, 375 N.W.2d 477; see also Roepke, 302 N.W.2d 350. However, Defendants dispute the fact that Minnesota courts would further extend this theory to encompass situations analogous to the present case.

In Cargill, the issue before the state supreme court was whether the owner-occupants of a family farm corporation were entitled to use a reverse pierce of the

corporate entity to assert a homestead exemption. While declining to adopt an equitable interest theory, the court allowed a reverse pierce to protect the owner-occupants' homestead exemption. Citing a 1981 Minnesota Supreme Court case, the court held that the "approach of a reverse pierce of the corporate veil may be used." Cargill, 375 N.W.2d at 478 (citing Roepke, 302 N.W.2d 3 50 (Minn. 198 1) (disregarding the corporate entity to further the purposes of the No-Fault Act.)) However, this theory of recovery cannot rest entirely on policy reasons. The test for application of the reverse pierce theory consists of a comparison between (1) the identity of the individual and his or her corporation, (2) the extent to which the corporation is an alter ego, and (3) whether others, such as a creditor or other shareholders would be harmed by a pierce. The court warned that a reverse pierce should only be permitted in the most carefully limited circumstances because of the potential danger of a debtor being able to raise or lower his corporate shield. See id. at 480.

The first prong of this test includes such factors as insufficient capitalization for purposes of corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation at time of transaction in question, siphoning of funds by dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of corporation as merely a facade for individual dealings. White v. Jorgenson, 322 N.W.2d 607, 608 (Minn. 1982). The second prong examines the relationship of the plaintiff to the corporation. It requires the showing of "an element of injustice or fundamental unfairness." White, 322 N.W.2d at 608; BBCA, 630 F.Supp. at 351.

The Court finds that these two prongs have been satisfied. Regarding the first prong of the test, it is apparent there is a close identity between the Defendants and CJS. CJS holds no other assets besides the farm property in question. None of the usual corporate formalities exist, such as keeping corporate minutes or filing corporate tax returns. As in United States v. Gerads, the "trustees" of these companies played no part in managing the property or operating the farm. See 1993 WL 114411. Further, after the transfers, the Defendants continued to operate the farm as they always had, living on and using the property as they wished, without benefit of a lease nor payment of rent. Moreover, Epsilon Company received no consideration for the transfer to CJS. As the Eighth Circuit recognized in affirming Loren and Laverne's criminal convictions: "Loren and Laverne Scherping, owners and operators of a dairy farm, [a]fter the IRS decided the Scherpings owed a tax deficiency, purported to convey their farm to [CJS]." Clearly, the only effect of placing the property in the trusts was that the name of the title holder changed. Considering these facts together, the conclusion is inescapable that nothing changed as a result of the transfer and that CJS was merely an alter ego for the taxpayer Defendants.

However, Defendants assert that the third prong of the reverse pierce test has not been satisfied. To further their argument, they rely on the Roepke holding, asserting that as shareholders of CJS, they will be harmed if the pierce is allowed. Specifically, Defendants point to the Roepke language that a reverse pierce was the equitable result when no shareholder or creditor "would be adversely affected." Roepke, 302 N.W.2d at 353. Importantly, the court limited its holding to the particular facts of the case before it and stated that the most significant facts

considered regarded the relationship between the individual shareholder and the corporate identity.

Therefore, this Court finds Defendants' assertion to be without merit. First, the facts of the present case show that CJS is the alter ego of the Scherpings. Second, the Defendants in the present case are not innocent shareholders who need the Court's protection. Allowing the Defendants to hide behind their created trust entities in an attempt to avoid paying taxes would result in the very sort of fraud and injustice that the alter ego doctrine seeks to avoid.

Though the government admits that the Minnesota Supreme Court has not addressed the issue of whether a creditor may assert a reverse veil piercing theory in circumstances such as those presented in the present case, the Court finds that a reverse pierce is acceptable in the present situation.

> Where a corporation has been organized and used as an instrument of fraud; where, as here, an individual has incorporated himself in order to hinder and if possible, defraud creditors, courts will go as far as necessary in disregarding the corporation and its doings in order to accomplish justice. Such a corporation is a mere parasitic growth, a mass of fungus, which will be lopped off clean whenever necessary to sound results.

Matchan v. Phoenix Land Inv., 198 N.W. 417, 420 (1924). Considering the long line of federal cases which hold that the reverse veil piercing theory is available to the IRS in appropriate circumstances, and that the Minnesota Supreme

Court has approved the theory in a different, but related, context, the Court finds that equity insists that the reverse veil piercing theory proceed. Because the CJS trust was merely an alter ego of Defendants, the Court holds that the trusts will be disregarded and the government will be allowed to foreclose its tax liens upon the property without regard to any claims of the trusts.

C. Fraudulent Conveyance

Regardless of whether CJS is the alter ego of the Scherpings, the government challenges the purported transfers of the 200 acres of property in question to the Epsilon Company and to CJS as fraudulent pursuant to Minnesota Statutes sections 513.25 and 513.26. Defendants deny this allegation. To make this determination, the Court once again looks to state law.

The controlling statutes in effect at the time of the alleged fraudulent transfers in 1979 and 1982 were Minnesota Statutes sections 513.25[5] and 513.26.[6] These

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[5] Minn. Statutue. § 513-25 provided:

> Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

Minn. Stat. § 513.25 (repealed in 1986).

[6] Minnesota Statute § 513.26 provided:

> Every conveyance made ... with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

Minn. Stat. § 513.26 (repealed in 1986).

sections were repealed in 1986 and replaced with Minn. Stat. section 513.44 which provides in pertinent part:

> (a) A transfer made ... by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made ... if the debtor made the transfer . . .
> (b) with actual intent to hinder, delay or defraud any creditor of the debtor.

Minn. Stat. § 513.44.

Actual intent may not be presumed. A court may consider numerous factors, considered as badges of fraud, in determining whether a transfer was made with actual intent to defraud creditors, including whether the debtor retained possession and control of the property after the transfer, whether the transfer was of substantially all the debtor's assets, whether the debtor received consideration reasonably equivalent to the value of the property, whether the debtor became insolvent shortly after the transfer, and whether the transfer occurred shortly before or after the debtor incurred a substantial debt. See Minn. Stat. § 513.44(b); United States v. Wurdemann. 663 F.2d 50, 51 (8th Cir. 1981). "Under Minnesota law, if a creditor demonstrates sufficient badges of fraud, the burden of production shifts to the party contending that a fraudulent conveyance has not occurred." Xemas, Inc. v. United States 689 F. Supp. 917, 922 (D. Minn. 1988).

In the present case, the United States has met its burden of production. It is undisputed that the conveyances between the Scherpings to Epsilon and from Epsilon to CJS were made without fair consideration. In addition, it is

undisputed that Defendants continued living on and farming the property. Further, the Scherpings made deliberate efforts to evade payment of their tax liabilities and were found guilty of conspiracy for tax evasion. Clearly, the Scherpings intended or believed that they would incur debts beyond their ability to pay. Therefore, the burden of production shifted to the Defendants, but they failed to "come forth with credible evidence rebutting the inference that the conveyances at issue were fraudulent." Id. at 917. Accordingly, the Court finds that the transfers were fraudulent under Minnesota law and must be set aside.

Consequently, the CJS entity will be disregarded, and the Court will treat the farm as if owned by Loren and Laverne. As such, the IRS has the right to use the 200 acres of farm property to satisfy Defendants' debts to the government. The Court may order a sale of property in which a taxpayer has an interest in order to satisfy the taxpayer's debt. See 26 U.S.C. § 7403(c); United States v. Bierbauer. 936F.2d 373, 374 (8th Cir. 1991). Therefore, the Court orders a sale of the property, with the proceeds to be applied to satisfy Loren and Laverne's tax liability.

CONCLUSION

The Court finds that CJS was the alter ego of the Scherping brothers. In addition, the Court finds that the attempts by the Scherping Defendants to transfer approximately 200 acres of farm property to Epsilon Company Trust were fraudulent. Finally, the Epsilon trustees' attempt to convey the same property to CJS was also fraudulent. Therefore, the Court orders a sale of the property in question with the proceeds given to the government as judgment on the federal tax lien. Any

remaining portion of the sale shall be returned to the Scherpings.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. Plaintiff United States of America's Motion for Summary Judgment (Clerk Doc. No. 121) is GRANTED;

2. The sale of the property which is the subject matter of this action, and which is described in Exhibits A-1, A-2, A-3, B- 1, B-2, B-3, and D of Plaintiff's Original Complaint, is hereby ordered pursuant to 28 U.S.C. § 2001; and

3. The proceeds of the sale will be paid over to the United States. Any excess proceeds will be paid to each of the Scherping Defendants after expenses and costs of sale.

LET JUDGMENT BE ENTERED ACCORDINGLY,

[signed] Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

Dated: March 4, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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Civil No. 4-89-825

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United States of America,
Plaintiff,

v.

Laverne Scherping; Loren Scherping; Jane Scherping;
"Epsilon Company"; and "C.J.S. Ranch",
Defendants.

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MEMORANDUM AND ORDER

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Jerome G. Arnold, Kenneth Saffold, Jeffrey D. Snow,
for Plaintiff

Lawrence H, Crosby,
for defendants Scherping and Epsilon Co,

John R. Koch,
for defendant C.J.S. Ranch,

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This matter is before the Court on defendants' motions for dismissal without prejudice because of insufficiency of service of process. The motion of defendant C.J.S. Ranch will be granted. The motions of defendants Laverne Scherping, Jane Scherping, Loren Scherping, and Epsilon Company will be denied.

FACTS

This is an action by the United States to reduce to judgment certain income tax assessments against defendants Laverne Scherping, Loren Scherping and Jane Scherping, and to foreclose tax liens created by the judgment against a parcel of farmland allegedly fraudulently conveyed to and presently held by defendants Epsilon Company and C.J.S. Ranch.

The United States' complaint in this action was filed September 18, 1989, and the summons issued September 20, 1989. On September 26, 1989, plaintiff attempted service by delivering a copy of the summons and complaint, together with two copies each of the notice and acknowledgement, by certified mail, return receipt requested, to Loren Scherping and Jane Scherping, each at Route 1. Box 11AA, Freeport, MN; to Laverne Scherping at Route 1, Box 11, Freeport, MN; and to Epsilon Company at Route 1, Box 11, Freeport, MN. Defendant Laverne Scherping signed for each of these four packages, which were brought to his home by a postal service employee on or about September 30, 1989, Declaration of Laverne Scherping ¶ 5. Defendants Loren Scherping and Jane Scherping state, however, that they never received a summons and complaint, and none of the defendants have formally acknowledged service. On November 16, 1989, plaintiff attempted to serve defendant C.J.S. Ranch by certified mail, but delivery was refused. Affidavit of Publication of Summons ¶ 4.

On December 26, 1989, a United States Marshal, with the assistance of a Stearns County Deputy Sheriff, went to the residence of Laverne Scherping (Route 1, Box 11, also identified as 26718 358th Street, Freeport). They

could see burning lights and could hear operating equipment. A male looked out but then closed the door. They could hear a dog barking from inside the house. No one responded, however, to their knocks on the door and verbal calls. Memorandum of W.W. Ott, Deputy U.S. Marshal, dated December 27, 1989, Affidavit of Publication, Exhibit A.

The deputy marshal and deputy sheriff then went to the address for Loren Scherping and Jane Scherping (Route 1, Box 11AA, also identified as 35955 County Road 172, Freeport), but received no response from the occupants. Ott Memorandum.

They then returned to the Laverne Scherping address, but found that a large dog which had previously been heard barking inside the house was now in the yard; the dog was "attacking" one of their vehicles. Under the circumstances, the deputy marshal and the deputy sheriff decided not to attempt further contact. Ott Memorandum.

On December 27, 1989, "Notices of Attempted Service" were mailed by the United States Marshals Service to Laverne Scherping, Loren Scherping and Jane Scherping.

On December 18, 1989, the United States Magistrate, noting that more than sixty days had elapsed since suit was filed, ordered counsel for plaintiff to (1) notify defense counsel that he is required to make an appearance or move for an extension of time; (2) file an application for entry of default unless the required pleading is filed within ten days; or (3) advise the Court in writing of any good cause to the contrary, and that unless plaintiff's counsel complied with the order within twenty days, the

case would be dismissed for lack of prosecution. At plaintiff's request, the Magistrate subsequently ordered that compliance with the Court's December 18, 1989 order be extended to February 16, 1990. On January 19, 1990 plaintiff filed with the Court a notice of summons by publication addressed to each of the defendants.

Defendants now move to dismiss on the grounds of insufficiency of process and service of process. Defendants argue that service upon them by publication was ineffective. Plaintiff does not argue that any of the defendants were properly served by publication, but rather that there is good cause for granting it additional time in which to accomplish personal service, and that dismissal of the action would leave the United States without a remedy because the statute of limitations on the claim against the Scherpings expired on September 25, 1989.

DISCUSSION

I. Whether Plaintiff Should Be Granted Additional Time in Which to Serve the Individual Defendants

Federal Rule of Civil Procedure 4(j) provides:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own

initiative with notice to such party or upon motion.

Rule 4 provides that service upon an individual may be accomplished either pursuant to the law of the state in which the district court is held, or by mailing a copy of the summons and complaint to the person served, together with two copies of the notice and acknowledgement. Fed.R.Civ.P. 4(c)(2)(C)(i), (ii). If no acknowledgement of service is received by the sender within twenty days after the date of mailing, service shall be made by delivering a copy of the summons and complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Fed.R.Civ.P. 4(d)(1).

In this case, plaintiff first attempted service upon the individual defendants by mailing, and when no acknowledgement of service was received, attempted personal service. When this was unsuccessful, plaintiff then attempted service by publication pursuant to Minnesota Rule of Civil Procedure 4.04.

Defendants raise a number of objections to plaintiff's attempt to serve them by publication pursuant to Minn.R.Civ.P. 4.04. In addition to a number of technical objections to the notice of publication and affidavit submitted in support thereof, defendants argue that the federal rules do not permit service by publication according to state law where service is first attempted by mail under Fed.R.Civ.P. 4(c)(2)(C)(ii) See Billy v. Ashland Oil Inc., 102 F.R.D. 230, 233 (W.D.Pa., 1984) ("[w]hen plaintiff did not receive the notice and acknowledgement forms after the first attempted service, having elected to proceed under

Rule 4(c)(2)(C)(ii), personal service was mandatory"); Kress v. Scott Instruments, 116 F.R.D. 631, 632 (W.D.Pa. 1987) ("if a plaintiff attempts service by first class mail under Rule 4(c)(2)(C)(ii) and is stymied, even though by the obduracy of the defendant, the rule specifically requires personal service and does not at that stage provide the alternative of state methods of service") ; see also Green v. -- Humphrey Elevator, 816 F, 2d 877 (3d Cir, 1987) ; but see Humana v. Jacobson, 804 F.2d 1390 (5th Cir, 1986) (contra).

In response, plaintiff does not defend its use of Minn.R.Civ.P. 4.04, and apparently concedes that having elected to attempt service by mail, the alternative route of service by publication was no longer available to it. Instead, plaintiff argues that its attempt at service by mail, followed by attempted personal service at defendants' residences, demonstrates sufficient diligence to justify extension of time for service for "good cause" under Rule 4(j). Plaintiff argues that it can reasonably be inferred from the memorandum prepared by the United States Marshals Service in regard to the attempted service that defendants intentionally tried to evade service.

Plaintiff relies upon Ruiz Varela v. Sanchez Velez, 814 F.2d 821 (1st Cir. 1987) for the proposition that a defendant's intentional evasion of service constitutes good cause for failure of service under Rule 4(j). In Ruiz Varela, the district court dismissed sua sponte plaintiff's complaint as to a certain defendant when service was not accomplished within 120 days of filing. Plaintiff argued in a motion for reconsideration that the defendant knew of the lawsuit but had evaded service, but the court denied the motion for reconsideration. The United States Court of Appeals for the First Circuit reversed, holding that "evasion

of service by a putative defendant constitutes good cause for failure of service under Rule (j)." Id. at 823. The court held that the district court should have held a hearing to consider plaintiff's factual allegations, and remanded for further consideration.

Upon review of the affidavit submitted in connection with the motion, and, in particular, the detailed memorandum submitted by the marshal in connection with his attempts to serve defendants personally on December 26, 1989, it appears to the Court that the defendants have intentionally evaded service. Laverne Scherping admits signing for four packages addressed to himself, Loren Scherping, Jane Scherping and Epsilon Company, but none of the defendants returned the notice of acknowledgement form attached thereto. Further, it appears to the Court that the Scherpings were at their residences on December 26, 1989, that they knew that the marshal was attempting to serve process upon them, and that they deliberately refused to answer the marshal's knocks on the door and verbal calls in order to evade service. Finally, after the marshal's unsuccessful attempt at personal service, defendants were sent "Notices of Attempted Service."

Based on these facts, it appears to the Court that the Scherpings and Epsilon Company have deliberately attempted to evade service, and that the government has exercised reasonable diligence in attempting service.

Defendants argue that courts have interpreted the "good cause" rule as requiring more than a single unsuccessful attempt at service, relying on Baden v. Craig-Hallum, Inc., 115 F.R.D. 582 (D.Minn. 1987). In Baden, one defendant in a securities action moved for dismissal on the grounds that he was not served within 120 days of

filing. The Court noted that requests for enlargement of time under Fed.R.Civ.P. 6(b) prior to the expiration of the 120-day period are to be "liberally permitted," while requests after the 120-day period has expired, or when raised as defense to a motion to dismiss, are subject to the "good cause" standard specified in Rule 4(j). According to the Court, the good cause standard is a "stringent standard" requiring diligence; the inadvertence of counsel does not qualify as good cause, 115 F.R.D. at 586, The Court quoted the following from Winters v. Teledyne Movible Offshore, Inc. 776 F.2d 1304, 1306 (5th Cir, 1985):

> Without attempting a rigid or all-encompassing definition of "good cause," it would appear to require at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice, and some showing of "good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified" is normally required.

Winters, 776 F.2d at 1306, quoting 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 1165 at 622. The Court held that a single unsuccessful attempt at service by mail, or a single fruitless telephone call, by themselves do not constitute good cause. 115 F.R.D. at 586. The Court noted that plaintiff did exercise a "certain degree of diligence in attempting personal service," and when unsuccessful, attempted service by mail. Accordingly, the Court found sufficient cause for delay. Id. at 587.

The Court finds that the plaintiff has shown that it has made reasonably diligent efforts in attempting personal service on the individual defendants in this case. Moreover, it does appear that these defendants have intentionally attempted to evade service. Accordingly, the Court will deny defendants' motion to dismiss and grant plaintiff an additional seventy-five days from the date of this order in which to effect service upon the individual defendants.

II. Whether Good Cause Exists for Delay in Service Upon the Corporate Defendants

As with individual defendants, the Federal Rules of Civil Procedure permit service upon a domestic corporation, partnership, or other unincorporated association subject to suit under a common name, either pursuant to state law, or by mailing a copy of the summons and complaint to the person to be served, together with two copies of a notice and acknowledgement. Fed.R.Civ.P. 4(c)(2)(C)(i), (ii). If no acknowledgement of service is received within twenty days, service shall be made by delivering a copy of the summons and complaint to an officer, the managing agent or general agent, or to any other agent authorized by appointment or by, law to receive service of process. Fed.R.Civ.P. 4(d)(3).

A. Service Upon Epsilon Company

Here, it is undisputed that Laverne Scherping was a trustee of Epsilon Company until resigning on September 19, 1989 when the company was dissolved. Declaration of Laverne Scherping ¶ 2, 3. On or about September 30, 1989, Laverne Scherping accepted delivery of the four packages containing the summons and complaints in this

action addressed to the three individual defendants, as well as Epsilon Company. Scherping never returned the notice of acknowledgement, either on his own behalf or on behalf of Epsilon Company, and on December 26, 1989, as discussed above, the United States Marshal unsuccessfully attempted to serve Laverne Scherping, as well as the other (former) trustees of Epsilon, Laverne Scherping, Loren Scherping and Jane Scherping. Plaintiff then attempted service by publication on January 19, 1990.

Defendant Epsilon Company argues that notice of publication was ineffective on a variety of grounds, including the argument that service under state law was not available since plaintiff first attempted service by mail pursuant to the federal rules. As noted above, plaintiff does not argue that its service by publication was effective, but rather contends that the action should not be dismissed because plaintiff's diligence in attempting personal service constitutes good cause for an extension of time in which to effect personal service. Epsilon responds by arguing that plaintiff failed to exercise due diligence because it did not attempt service upon the Minnesota Secretary of State as provided by Minn. Stat. § 543.08. This argument, however, is inconsistent with defendants' argument that plaintiff's notice of publication was ineffective because state law methods of service were not available once the plaintiff elected to attempt service under the federal rules. Either state law methods of service were permissible, in which case notice of publication was available to the plaintiff, or they were not, in which case plaintiff cannot be faulted for not attempting service upon the Secretary of State. The Court finds that plaintiff's efforts to serve Epsilon Company by attempting to personally serve its trustees constitutes reasonable diligence. Defendants' failure to return the notice of acknowledgement, as well as

the events described in the United States Magistrate's memorandum, strongly suggest that defendants attempted to evade service, For these reasons, the Court finds good cause for an extension of time in which to permit plaintiff to complete service upon Epsilon Company.

B. C.J.S. Ranch

As to C.J.S. Ranch, plaintiff apparently assumed that Loren Scherping was a trustee of C.J.S. Ranch, and could therefore accept service of process on behalf of the ranch. Accordingly, plaintiff's efforts to serve C.J.S. Ranch were focused upon Loren Scherping. The ranch, in a separate memorandum prepared by separate counsel, has provided documentation indicating that the trustees of C.J.S. Ranch are two South Dakota corporations by the names of Parnell and Armageddon, and that the agent for service of process for these companies in Minnesota is John B. Ellering, 466 First Street S.E., Apt. 5, Richmond, Minnesota, There is no allegation that plaintiff attempted service upon Ellering on behalf of C.J.S. Ranch. Plaintiff does not indicate why it assumed that Loren Scherping was a trustee, and/or an agent for service of process for C.J.S. Ranch.

Defendant C.J.S. Ranch contends that plaintiff could easily have ascertained the proper individual for service of process by contacting the Minnesota Secretary of State, and that there is therefore no basis for arguing that it exercised due diligence, or that defendant C.J.S. Ranch attempted to evade service of process, when no efforts were made to serve its lawfully appointed agent. Plaintiff has not shown the basis for its belief that Loren Scherping was "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of

process," Fed.R.Civ.P. 4(d)(3). The Court finds that plaintiff's failure to ascertain the identity of C.J.S. Ranch's designated agent for service of process by communication with the Secretary of State represents a material distinction between plaintiff's diligence with respect to this defendant, and with the other defendants. Plaintiff has not indicated why it contends that its efforts to serve C.J.S. Ranch by personal service upon Loren Scherping were reasonably calculated to comply with the Federal Rules of Civil Procedure. Nor does plaintiff argue that its effort to accomplish service of process upon this defendant by notice of publication was effective. Accordingly, the Court finds that plaintiff has failed to show good cause for an extension of time in which to serve C.J.S. Ranch, and will therefore grant defendant C.J.S. Ranch's motion to dismiss the complaint as to it without prejudice pursuant to Fed.R.Civ.P. 4(j).

Accordingly, based on the foregoing, and upon all the files, records and proceedings herein,

IT IS ORDERED that:

1. the motions of defendants Loren Scherping, Jane Scherping, Laverne Scherping and Epsilon Company to dismiss f or failure to accomplish service of process is denied;
2. plaintiff shall accomplish service of process upon these defendants within seventy-five days from the date of this order; and
3. the motion of defendant C.J.S. Ranch to dismiss for failure to accomplish service of process is granted without prejudice.

[signed] Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: May 31, 1990